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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KENNETH GHARIB,

Plaintiff and Appellant,

v.

NOVASTAR MORTGAGE, INC.,

Defendant and Respondent.

G039602

(Super. Ct. No. 06CC05597)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Bryant & Bryant, Kenneth A. Bryant and Michael P. Bryant for Plaintiff and Appellant.

Pite Duncan and Bruce J. Quilligan for Defendant and Respondent.

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Kenneth Gharib's home was foreclosed by his lender, Novastar Mortgage, Inc. (Novastar). He unsuccessfully sued for breach of contract and related claims, and now appeals the trial court's verdict. He claims there was no substantial evidence to support the trial court's conclusion that no breach of contract had occurred. He further argues the court should not have awarded attorney fees to Novastar. Gharib is wrong on both counts, and we therefore affirm.

I

FACTS

In 2001, Gharib and his wife obtained a mortgage from Novastar for a home in Orange. By 2004, Gharib had fallen behind on mortgage payments and on property taxes, which, at the time, were not paid through the mortgage. Novastar later paid the delinquent taxes to protect its interest in the property.

Novastar began foreclosure proceedings, but the parties entered into a Forbearance Agreement (the Agreement) on July 28, 2004. The Agreement stated that the current amount owing was \$439,303.61 and the amount in arrears was \$33,700.44. Gharib was to make an initial payment of \$15,000, with monthly payments thereafter to catch up on the amount owed. Novastar had also paid delinquent taxes for the years 2001 and 2002, and repayment for those amounts was included as part of the Agreement. The Agreement also stated: "Lender reserves the right to adjust the monthly mortgage payment amount to provide for: (1) repayment or payment of any and all taxes and penalties which come due (2) for any and all taxes and penalties which are past due and/or delinquent or which become past due and/or delinquent; and/or (3) for any installment of future taxes which may come due but are not yet due and payable, which are not provided for in this Agreement."

On July 28, 2004, Novastar's attorney sent Gharib a letter explaining the basis for the monthly payment under the Agreement. With respect to taxes, the letter explained that after Novastar paid the taxes due, it received a refund check for \$7,156.49,

which was the amount of taxes previously paid. This amount was applied to Gharib's tax shortage, leaving a balance of some \$4,600.

The refund was apparently a mistake on the tax authority's part. After the parties entered into the Agreement, the county assessed and Novastar paid an additional \$14,880.21 in taxes, penalties and supplemental assessments for 2001 and 2003. Novastar notified Gharib of this issue twice by letter. Gharib disputed the amount, claiming that all 2001 taxes should be covered by the Agreement. Novastar stopped accepting Gharib's payments thereafter, asserting they constituted only partial payments, and once again began foreclosure proceedings.

In 2007, Gharib sued Novastar, alleging, among other claims, breach of contract. After a one-day bench trial, the court found in Novastar's favor. The court subsequently granted Novastar's motion for attorney fees in the amount of \$48,877.50, based on an attorney fee clause in the original mortgage note. Gharib now appeals.

II

DISCUSSION

Gharib raises two issues on appeal. The first is whether "there [was] any evidence to support the trial Court's judgment denying breach of contract relief." The second is whether the trial court erred by awarding Novastar attorney fees.

Breach of Contract

Although Gharib pays lip service to the substantial evidence standard of review, both of his briefs then proceed to ignore it. He insists that the trial court was simply wrong and therefore, the judgment should be reversed as a matter of law.

Gharib is incorrect. "When findings of fact are challenged in a civil appeal, we are bound by the familiar principle that 'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We view the evidence most

favorably to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. [Citation.] Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. [Citation.] However, '[s]ubstantial evidence . . . is not synonymous with "any" evidence.' [Citation.] Instead, the evidence must be "'substantial" proof of the essentials which the law requires.' [Citation.]" (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.)

Thus, the question here is whether there was substantial evidence to support the court's conclusion that no breach of contract occurred. There was evidence presented by Novastar that Gharib was not, as he claimed, being charged twice for the same tax payments, and that the tax refund was properly credited to his escrow account. The Agreement did not, as Gharib seems to suggest, relieve him from the responsibility of paying taxes that were subsequently assessed.

The accounting Novastar prepared demonstrated that Novastar paid taxes to the county in 2004, after the Agreement was executed, for tax years 2001 and 2003. It strains credulity to suggest that Novastar anticipated that it would be responsible for additional tax assessments not yet contemplated as part of that Agreement. Indeed, the Agreement explicitly stated: "Lender reserves the right to adjust the monthly mortgage payment amount to provide for: (1) repayment or payment of any and all taxes and penalties which come due (2) for any and all taxes and penalties which are past due and/or delinquent or which become past due and/or delinquent; and/or (3) for any installment of future taxes which may come due but are not yet due and payable, which are not provided for in this Agreement." Gharib was thus responsible for the back tax payments, and therefore, there was substantial evidence that Novastar did not breach the Agreement.

Attorney Fees

The entirety of Gharib's argument on this point is that Novastar was not entitled to an attorney fee award because he was suing on the Agreement, which did not include an attorney fee provision. This argument, however, is so poorly developed that we might deem it waived. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) In any event, it has no merit.

Civil Code section 1717, subdivision (a) governs: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law. [Citations.]" (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) Thus, the issue whether Civil Code section 1717, subdivision (a) applies here is a question of law, and the proper standard of review is de novo. (See *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102.)

The promissory note, referenced both in plaintiff's complaint and the Agreement, includes an attorney fee clause: "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees."

Because Gharib initiated this lawsuit, its defense became part and parcel of all “costs and expenses in enforcing this Note.” There is no distinction in the law between offensive and defensive attorney fees. (*Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 107.) Thus, the trial court did not err in concluding that Novastar was entitled to attorney fees.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.